Decision in CPLR Article 78 proceedings - Singh, Tony

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN

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IN THE MATTER OF THE APPLICATION OF
TONY SINGH, 90 B 0467,

Petitioner,

FOR A JUDGMENT UNDER ARTICLE 78 OF THE CIVIL PRACTICE LAW AND RULES

-against-

ANDREA EVANS, Chairwoman of NYS Bd. of Parole,

Respondent.

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COPY

DECISION and ORDER
Index #1411-13
RJI # 52-34269-13

APPEARANCES: Tony Singh, 08 A 4688
Woodbourne Correctional facility
99 Prison Road, PO Box 1000
Woodbourne, NY 12788
Petitioner, *pro se*

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By: Tracy Steeves, AAG, of counsel
Attorney for Respondent

LaBuda, J.

Petitioner seeks Article 78 relief to overturn his parole denial arguing, *inter alia*, that the parole board's decision was arbitrary and capricious. Petitioner submitted a Verified Petition with exhibits. Respondent submitted an answer and return with exhibits. Petitioner submitted a reply affirmation with exhibits.

In early 1990 Petitioner was convicted of Robbery in the Third Degree and was sentenced as a second felony offender to an indeterminate term of two to four years in state prison. Later that year, Petitioner was convicted of Robbery in the Second Degree and was sentenced to an indeterminate term of one and a half to four years in state prison. In February of 1992, Defendant was convicted of Murder in the Second Degree and Criminal Possession of a Weapon in the

Second Degree for a murder he committed prior to his incarceration. He received a sentence of 20 years to life for the murder conviction and seven and a half to 15 years in state prison for the murder and weapons convictions respectively. In 1998 petitioner was convicted of Attempted Assault in the Second Degree and Attempted Possession of Prison Contraband in the First Degree for an incident that occurred in prison. He was sentenced to an aggregate term of one and a half to three years in prison to run concurrently for both convictions, but consecutively to the prior convictions.

Petitioner appeared for his second parole interview on November 6, 2012. The parole board denied release with a 24-month hold. Petitioner timely perfected an administrative appeal on January 31, 2013, to which there was no response from the Appeals Unit. Petitioner then timely submitted the within petition. At the outset, this Court finds that Petitioner was in no way prejudiced by the failure of the Appeals Unit to render a decision on the administrative parole appeal. 9 NYCRR §8006.4(c); ***Matter of Graham v. NYS Div. of Parole*, 269 AD2d 628 [3rd Dept. 2000]**.

In this proceeding, Petitioner argues (1) that several of the crimes listed on documents provided to the parole board should not have been listed as instant offenses and that dismissed charges should not have been included on the Inmate Status Report; (2) that the board failed to consider and properly weigh the required statutory factors; (3) that the board's decision was a resentencing; and (4) that the board failed to consider the deportation order.

Parole Law

Executive Law, Section 259-i(2)(c)(A) states in pertinent part:

> In making the parole release decision, the guidelines adopted pursuant to subdivision four of section two hundred fifty-nine-c of this article shall require that the following be considered: (i) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interpersonal relationships with staff and inmates; (ii) performance, if any, as a participant in a temporary release program; (iii) release plans including community resources, employment, education and training and support services available to the inmate....

The parole board must also consider whether "there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for the law." 9 NYCRR 8002.1.

In reaching its decision, the board must also consider:

(a) the inmate's institutional record;

(b) the inmate's release plans;
(c) any statement made to the board by the victim's representative;
(d) the seriousness of the offense, with consideration of the sentence and the recommendation of the sentencing court; and
(e) the inmate's prior criminal record.

Parole Boards have very wide discretion to grant or deny parole release; the board decides how much weight to give each of the factors listed above. ***Phillips v. Dennison*, 41 A.D.3d [1st Dept. 2007]**. It is also not necessary that the board expressly discuss each of the factors or any guidelines in its determination. ***Walker v. Travis*, 252 A.D.2d 360 [3rd Dept. 1998]**. An inmate bears the heavy burden of establishing that the determination of a parole board was the result of "irrationality bordering on impropriety." ***Matter of Silmon v. Travis*, 95 N.Y.2d 470 [2000]; *Russo v. New York State Bd. of Parole*, 50 N.Y.2d 69 [1980]**. Nonetheless, the reasons for denying parole must "be given in detail and not in conclusory terms." **Executive Law, Section 259-i(2)(a); *Waltman v. Travis*, 18 A.D.3d 304 [1st Dept. 2005]; *Malone v. Evans*, 83 A.D.3d 719 [2nd Dept. 2011]**.

The standard of review in regard to parole release is whether the decision was so irrational as to border on impropriety. ***Matter of Russo v. New York State Board of Parole*, 50 NY2d 69 [1980]; *Epps v Travis*, 241 AD2d 738 [3rd Dept. 1997]; *Matter of Silmon v. Travis*, 95 NY2d 470 [2000]**. When considering the various factors, the weight accorded to any particular factor is solely within a parole board's discretion. ***Matter of Santos v. Evans*, 81 AD3d 1059 [3rd Dept. 2011]; *Matter of Wise v. New York State Division of Parole*, 54 AD3d 463 [3rd Dept. 2008]**. Included in such factors are the seriousness of the instant offense(s) and an inmate's criminal history. **Executive Law §259-i(2)(A)**.

In 2011, the legislature made changes to **Executive Law, §259**. The changes to **Executive Law, §259-c(4)** became effective on October 1, 2011. In essence, those modifications now require that parole boards (1) consider the seriousness of the underlying crime in conjunction with the other factors enumerated in the statute, **Executive Law, §259-i(2)**, and (2) conduct a risk assessment analysis to determine if an inmate has been rehabilitated and is ready for release. **Executive Law, §259-(c)(4)**. The changes were intended to shift the focus of parole boards to a forward-thinking paradigm, rather than a backward looking approach to evaluating whether an inmate is rehabilitated and ready for release.

Such changes, however, were by no means intended to limit parole boards' historic and well-established authority and independent judgment when considering and applying the statutory factors in parole matters. ***People v. Lankford*, 938 NYS2d 784 [Sup. Ct. Bronx Co. 2012]**. Referring to the 2011 changes to the Executive Law, the *Lankford* court stated, "the legislation makes clear that the board shall continue to exercise its independence when making such decisions. The new agency's provision of administrative support will not undermine the board's independent decision-making authority (see, Laws of 2011, Part C, Sub. A, §1)." ***Id.*, at**

788, citing *Thwaites v. New York State Board of Parole*, 934 NYS2d 797 [Sup. Ct. Orange Co. 2011].

To further clarify a parole board's responsibility when reviewing an inmate's eligibility or readiness for parole, Respondent issued a Memorandum, dated October 5, 2011, which indicated that the 2011 amendments only require the board to establish written procedures for use in considering and rendering decision on parole release eligibility. The written procedures require that a reviewing board use risk and needs principles to gauge an inmate's rehabilitation. Parole release has been, and remains, a discretionary function of a parole board. ***Thwaites v. New York State Board of Parole*, 934 NYS2d 797 [Sup. Ct. Orange Co. 2011].**

Discussion

Before turning to the merits of the petition, this Court finds that the issues raised for the first time in this petition, to wit: the decision denying parole release is a resentencing and the board failed to consider the deportation order, are unpreserved for review, as they were not raised in the administrative proceeding. *Otero v. NYS Bd. of Parole*, 266 AD2d 771 [3rd Dept. 1999]. This Court is limited to reviewing those issues raised in the administrative appeal to the Appeals Unit. *Roggemann v. Bane*, 223 Ad2d 854 [3rd Dept. 1996]. Therefore, this Court will not address those issues.

Petitioner's claim that the parole board's decision was arbitrary and capricious is unsupported by the record. Overall, taken as a whole, the record demonstrates the hearing and parole board's decision complied with the statutory provisions of the Executive Law. *Matter of Russo v. New York State Board of Parole, supra*. The transcript of the parole interview indicates a very detailed discussion of Petitioner's criminal history, difficulties in adjusting to prison during the first portion of his incarceration, and the significant change he has exhibited during the second portion of his incarceration. The board considered his positive behavior, programming, educational achievements, and his plans and support systems in Guyana. In light of the record, Petitioner has not met the heavy burden of establishing the parole board failed to follow the statutory guidelines. *Matter of Silmon v. Travis, supra*. There is nothing in the record to suggest that the parole board did not consider all of the factors when making its decision. The failure of the parole board to specifically and explicitly discuss each of the statutory factors with Petitioner during his interview is not grounds for this Court to disturb the board's decision. *Charlemagne v. NYS Div. of Parole*, 281 AD2d 669 [3rd Dept. 2001]; nor does it support Petitioner's contention that the board did not consider those factors. *Hawkins v. Travis*, 259 AD2d 813 [3rd Dept. 1999]. The transcript indicates the board discussed the offense at length and provided Petitioner with the opportunity to make any comments he wished regarding the offense or other matters, which he did, at length.

The board discussed the COMPAS risk assessment with Petitioner during the interview, as well. While at first blush it may appear that the COMPAS report is in conflict with the board's finding that "if released there is a reasonable probability that [petitioner] would not live at liberty

without again violating the law and that [petitioner's] release would be incompatible with the welfare and safety of society and would so deprecate the serious nature of the crime so as to undermine respect for the law," a close look at the record as a whole, supports the board's decision to deny parole. The board had the discretion to give whatever weight it deemed appropriate to each of the factors discussed or reviewed. **Executive Law §259-(c)(4)**; ***Matter of Santos v. Evans, supra.*** The board afforded significant weight to the serious nature of the instant offense of murder, as well as to Petitioner's criminal history and poor initial disciplinary history during the early portion of his incarceration; the Court finds these were appropriate factors for the parole board to consider and for which to give much weight. ***Matter of Marcus v. Alexander*, 54 AD3d 476 [3rd Dept. 2008]**; ***Gardiner v. New York State Div. Of Parole*, 48 AD3d 871 [3rd Dept. 2008]**. The record indicates the parole board considered various factors, including the instant offense, Petitioner's positive programing, completion of DOCCS programs, volunteering for additional programs and training, educational and vocational goals, recent good disciplinary history and training achievements. Those achievements, however, did not and do not entitle Petitioner or any inmate to parole release, nor was the board required to give them any more weight than it deemed appropriate in its discretion. ***See*, *Matter of Pullman v. Dennison*, 38 AD3d 963 [3rd Dept. 2007]**. The board was well within its discretion to consider Petitioner's past criminal history, the seriousness of the instant offense of murder, the sentencing minutes, and the dichotomy between the first and second halves of Petitioner's incarceration. ***See*, *Simmons v. Travis*, 15 AD3d 896 [4th Dept. 2005]**.

The board issued a decision with sufficient facts and information to comply with the statutory standard. The interview and decision do not violate any standards in the statute. ***See*, *James v. Chairman of the NYS Div. of Parole*, 19 AD3d 857 [3rd Dept. 2005]**. To the contrary, the decision is specific and sufficiently detailed. There is no indication that the board failed to utilize risks and needs principles to assess Petitioner's readiness for release, whether he would re-offend if released, and whether his release presented a danger to the community. The board fully complied with **Executive Law §259-c(4)**. The record, in numerous places, indicates the board used the COMPAS Re-entry Risk Assessment. The board's decision to hold Petitioner for 24 months before another parole interview was well within its statutory authority and therefore not excessive. **Executive Law §259-i(2)(a)**.

As for whether the board relied on erroneous information in the Inmate Status Report, there is nothing in the record to suggest the board relied on any erroneous information that would prejudice Petitioner. A review of the record indicates that even if there were erroneous information in the Inmate Status Report, it was harmless error. ***Sutherland v. Evans*, 82 AD3d 1428 [3rd Dept. 2011]**. A parole board is statutorily required to obtain official reports and to rely on those reports. ***Billiteri v. US Board of Parole*, 541 F2d 938 [2nd Cir. 1976]**. The parole board is mandated to rely on the information provided; it is not empowered to make changes to the report. ***See*, *Williams v. Travis*, 11 AD3d 788 [3rd Dept. 2004]**. If there were errors in the Inmate Status Report, Petitioner should have addressed those issues with the parole board when given the opportunity to make additional statements. ***Carter v. Evans*, 81 AD3d 1031 [3rd Dept. 2011]**.

While this Court recognizes Petitioner has made much progress during the latter portion of his sentence, it cannot disturb the decision of the parole board, which was not arbitrary and capricious.

Based upon the above, it is

ORDERED, that the petition seeking Article 78 relief is denied in its entirety and dismissed.

This shall constitute the Decision and Order of this Court.

DATED: October 11, 2013
Monticello, New York

Hon. Frank J. LaBuda
Acting Supreme Court Justice

Papers considered:

Order to Show Cause
Affidavit/Verified Petition with Exhibits, by Petitioner, dated May 31, 2013
Answer and Return, Affirmation of Tracy Steeves, AAG, with Exhibits, dated August 27, 2013
Sealed Documents for *in camera* review
Reply Affidavit with Exhibits, by Petitioner, dated September 3, 2013